

FCC MAIL SECTION

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Federal Communications Commission

FCC 97-171

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of)	
)	
Guam Public Utilities Commission)	
)	
Petition for Declaratory Ruling)	CCB Pol. 96-18
concerning Sections 3(37) and 251(h))	
of the Communications Act)	
)	
Treatment of the Guam Telephone)	
Authority and Similarly Situated)	
Carriers as Incumbent Local Exchange)	
Carriers under Section 251(h)(2))	CC Docket No. 97-134
of the Communications Act)	

DECLARATORY RULING AND
NOTICE OF PROPOSED RULEMAKING

Adopted: May 16, 1997

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By the Commission:

TABLE OF CONTENTS

para.

I. INTRODUCTION	1
II. BACKGROUND	4
A. Relevant Provisions of the Communications Act	4
B. A Brief History of GTA	6
C. The Parties' Positions	10
III. DECLARATORY RULING	14
A. GTA's Status under Section 251(h)(1)	14

B.	GTA's Status under Section 3(37)	21
IV.	NOTICE OF PROPOSED RULEMAKING	22
A.	Overview	22
B.	Discussion	26
1.	Section 251(h)(2)(A)	26
2.	Section 251(h)(2)(B)	28
3.	Section 251(h)(2)(C)	40
4.	Proposal to Treat GTA -- and Possibly Others -- as an Incumbent LEC	43
C.	Procedural Matters	44
1.	<i>Ex Parte</i> Presentations	44
2.	Initial Regulatory Flexibility Analysis	45
3.	Comment Filing Procedures	46
V.	ORDERING CLAUSES	47

I. INTRODUCTION

1. On August 13, 1996, the Public Utilities Commission of the Territory of Guam (Guam Commission) filed a Petition for Declaratory Ruling (Petition) seeking a declaratory ruling on two questions arising from application of certain provisions of the Telecommunications Act of 1996 (1996 Act)¹ to the circumstances in the Territory of Guam (Guam):

(A) Is the Guam Telephone Authority (GTA) -- the local exchange carrier (LEC) throughout Guam -- an "incumbent local exchange carrier" within the meaning of section 251(h)(1) of the Communications Act,² and thus subject to the interconnection, unbundling, resale, and other obligations imposed by section 251(c) of the Act?³

¹ Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* The 1996 Act amended the Communications Act of 1934 (Act or Communications Act), 47 U.S.C. §§ 151 *et seq.* All citations herein to the 1996 Act will be to the 1996 Act as *codified in Title 47 of the United States Code.*

² 47 U.S.C. § 251(h)(1).

³ 47 U.S.C. § 251(c).

(B) Is GTA a "rural telephone company" within the meaning of section 3(37) of the Communications Act,⁴ and thus exempt (at least initially) under section 251(f)(1) of the Act⁵ from the obligations of section 251(c)?

2. We address these questions in Part III, below. With regard to the first question, we determine that GTA is not an "incumbent local exchange carrier" within the meaning of section 251(h)(1). GTA is not an incumbent LEC under that provision because it was not deemed to be a member of the National Exchange Carrier Association, Inc. (NECA) as of February 8, 1996, the date of enactment of the 1996 Act, and it has not since become a successor or assign of a NECA member.⁶ With regard to the second question, we determine that GTA is a "rural telephone company" within the meaning of section 3(37). GTA is a rural telephone company under that provision because it is a local exchange carrier operating entity that provides telephone exchange service to a local exchange study area -- Guam -- with fewer than 100,000 access lines.⁷

3. Our determination that GTA is not an incumbent LEC under section 251(h)(1) means that the obligations of section 251(c) do not apply to GTA at this time. Section 251(h)(2) of the Communications Act,⁸ however, allows us to treat a local exchange carrier such as GTA as an incumbent LEC for purposes of section 251 if certain statutory criteria are met.⁹ Because of the importance of the question for the development of telecommunications competition in Guam, we initiate a rulemaking proceeding pursuant to section 251(h)(2) to determine whether GTA should be treated as an incumbent LEC for purposes of section 251. We tentatively conclude that the statutory criteria for such treatment set forth in section 251(h)(2) are satisfied, and that such treatment is necessary to avoid frustrating the Congressional intent to include Guam within the new national policy framework of competition in telecommunications. We propose, therefore, to provide for the treatment of

⁴ 47 U.S.C. § 153(37).

⁵ 47 U.S.C. § 251(f)(1).

⁶ See 47 U.S.C. § 251(h)(1)(B). NECA is an association of LECs established by the Commission in the early 1980s to administer the interstate access tariff and revenue distribution processes. See *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 333-34 (1983).

⁷ See 47 U.S.C. § 153(37)(C); *Guam Telephone Authority Petition for Declaratory Ruling*, Report and Order, DA 97-595 (Accg. & Aud. Div. rel. March 21, 1997)(granting GTA's request for designation of Guam as a study area).

⁸ 47 U.S.C. § 251(h)(2).

⁹ We list those criteria in Part II(A), *infra*.

GTA as an incumbent LEC for section 251 purposes. We invite comment on these tentative conclusions and proposal. We also seek comment whether LECs situated similarly to GTA exist and, if so, whether we should adopt the same rule with respect to such class or category of LECs.

II. BACKGROUND

A. Relevant Provisions of the Communications Act

4. Section 251(h) establishes two alternative grounds for classifying a LEC such as GTA as an incumbent LEC. First, a LEC may satisfy the statutory definition of an incumbent LEC set forth in section 251(h)(1):

[T]he term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and (B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. § 69.601(b)); or (ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).¹⁰

Second, under section 251(h)(2), the Commission "may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of [section 251]"¹¹ if:

¹⁰ 47 U.S.C. § 251(h)(1). Section 69.601(b) of the Commission's rules provides:

All telephone companies that participate in the distribution of Carrier Common Line revenue requirement, pay long term support to association Common Line Tariff participants, or receive payments from the transitional support fund administered by the association shall be deemed to be members of the association.

47 C.F.R. § 69.601(b). The "association" to which section 251(h)(1) and this rule refer is NECA.

¹¹ 47 U.S.C. § 251(h)(2).

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.¹²

5. Section 251(c) requires incumbent LECs -- and *only* incumbent LECs -- to meet certain specified obligations with respect to interconnection, access to unbundled network elements,¹³ resale of their retail services, notification of interoperability changes to their facilities or networks, and collocation.¹⁴ Section 251(f)(1), however, provides an automatic exemption from section 251(c) for any incumbent LEC that is a "rural telephone company,"¹⁵ which section 3(37) defines as:

a local exchange carrier operating entity to the extent such entity (A) provides common carrier service to any local exchange carrier study area that does not include either (i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or (ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993; (B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines; (C) provides telephone exchange service to any local exchange study area with fewer than 100,000 access lines; or (D) has less than 15 percent of its access lines in

¹² *Id.*

¹³ "Network element" means "a facility or equipment used in the provision of a telecommunications service," and "includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29).

¹⁴ See 47 U.S.C. § 251(c)(2)-(6). See also Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 121-22 (1996) (*Joint Explanatory Statement*).

¹⁵ 47 U.S.C. § 251(f)(1).

communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.¹⁶

The automatic exemption from section 251(c) terminates if and when the rural telephone company receives a "bona fide request for interconnection, services, or network elements" that the relevant State commission determines is not unduly economically burdensome, technically infeasible, or inconsistent with statutory universal service requirements.¹⁷ Moreover, section 251(f)(2) of the Communications Act provides that a LEC "with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide"¹⁸ may:

petition a State commission for a suspension or modification of the application of a requirement or requirements of [section 251(b)] or [section 251(c)] to telephone exchange service facilities specified in such petition. The State Commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification (A) is necessary (i) to avoid a significant adverse economic impact on users of telecommunications services generally; (ii) to avoid imposing a requirement that is unduly economically burdensome; or (iii) to avoid imposing a requirement that is technically infeasible; and (B) is consistent with the public interest, convenience, and necessity.¹⁹

B. A Brief History of GTA

6. In 1973, the government of the Territory of Guam created GTA as a not-for-profit public corporation to provide local exchange and exchange access services to the Territory.²⁰ Since that time, GTA has operated as a semi-autonomous agency of the Territory

¹⁶ 47 U.S.C. § 153(37).

¹⁷ 47 U.S.C. § 251(f)(1).

¹⁸ 47 U.S.C. § 251(f)(2).

¹⁹ *Id.*

²⁰ See *IT&E Overseas, Inc. and PCI Communications, Inc. Petition for Emergency Relief and Expedited Declaratory Ruling*, Memorandum Opinion and Order, 7 FCC Rcd 4023 (1992)(*Guam Jurisdictional Order*), as modified in 7 FCC Rcd 4670 (1992), 7 FCC Rcd 7270 (1992), 8 FCC Rcd 8381 (1993)(all extending filing dates), *petitions for recon. pending*.

of Guam.²¹ GTA is regulated by the Guam Commission, which is also an agency of the government of the Territory of Guam. By 1995, GTA operated the twenty-ninth largest local telephone network in the United States, serving approximately 67,000 access lines.²² GTA appears to be the sole provider of local telephone service to the more than 130,000 residents of Guam.²³

7. On June 2, 1992, the Commission determined, *inter alia*, that GTA and Guam are subject to the Communications Act of 1934, even though that Act makes no explicit mention of Guam. The Commission based its finding of jurisdiction on its statutory mandate to "regulat[e] interstate and foreign commerce in communication by wire and radio."²⁴ The Commission noted that the Act expressly defines such communication to include transmissions to or from any Territory of the United States.²⁵ The Commission concluded, therefore, "that the Communications Act was intended by Congress to apply, . . . in every respect, to all radio and wire communications originating or terminating on the Territory of Guam."²⁶

8. In the *Guam Jurisdictional Order*, the Commission also concluded that GTA had engaged in unjust, unreasonable, and unreasonably discriminatory practices in violation of

²¹ See *GTA NECA Membership Order* at ¶ 2.

²² *Phone Facts* at 9 (United States Telephone Association 1996 ed.) (indicating that in fiscal year 1995 GTA was the twenty-ninth largest telephone company, with 66,587 access lines). See Comments of Guam Cable Telecommunications, Inc. in *Applications for GTA Interconnection and Resale Under the 1996 Telecommunications Act*, Guam Commission Docket No. 96-006, at 2 (attached to the Guam Commission's Petition); Comments of TelePacific Network, Inc. in *Applications for GTA Interconnection and Resale Under the 1996 Telecommunications Act*, Guam Commission Docket No. 96-006, at Exhibit C (attached to the Guam Commission's Petition). See also Comments of Guam Cable Telecommunications, Inc. at 3; Comments of MCI Telecommunications Corp. at 3.

²³ See Bureau of the Census, United States Department of Commerce, *1990 Census of Population and Housing: Guam* at 1; Letter dated February 5, 1997 from Veronica M. Ahern, GTA's outside counsel, to Alex Starr, FCC's Common Carrier Bureau, CCB Pol. 96-18; Comments of the Guam Telephone Authority in *Applications for GTA Interconnection and Resale Under the 1996 Telecommunications Act*, Guam Commission Docket No. 96-006, at 3 n.4 (attached to the Guam Commission's Petition). See also Comments of MCI Telecommunications Corp. at 3.

²⁴ *Guam Jurisdictional Order*, 7 FCC Rcd at 4024 (quoting 47 U.S.C. § 151).

²⁵ *Id.* See 47 U.S.C. §§ 153(e)(1991)(now codified at 47 U.S.C. § 153(22)), 153(g)(1991)(now codified at 47 U.S.C. § 153(50)), 153(f)(1991)(now codified at 47 U.S.C. § 153(17)).

²⁶ *Guam Jurisdictional Order*, 7 FCC Rcd at 4024.

sections 201 and 202 of the Act.²⁷ In particular, the Commission found that GTA had favored one interexchange carrier over all others by refusing to provide access services, providing inferior access services, using a non-standard network interface, and imposing excessive access charges.²⁸ As a result, the Commission ordered GTA, *inter alia*, to show cause why it should not be required to file lawful interstate and foreign exchange access service tariffs with the Commission pursuant to sections 201 and 202 of the Act.²⁹

9. The *Guam Jurisdictional Order* triggered a series of reforms in GTA's practices and policies that continues to this day.³⁰ As of the date of enactment of the 1996 Act, however, GTA had not participated in NECA's carrier common line pool, paid long term support to NECA common line tariff participants, or received payments from NECA's transitional support fund.³¹ Since that date of enactment, GTA has successfully petitioned the Commission to become a member of NECA and thereby participate in NECA's common line pool.³²

C. The Parties' Positions

10. In its Petition, the Guam Commission states that, in the spring of 1996, GTA received requests from TelePacific Network, Inc. (TNI) and Guam Cable Telecommunications, Inc. (GCT) to interconnect with GTA's network and resell GTA's local

²⁷ 47 U.S.C. §§ 201, 202.

²⁸ *Guam Jurisdictional Order*, 7 FCC Rcd at 4025-26.

²⁹ *Id.* at 4026-27.

³⁰ See generally *Guam Telephone Authority Tariff No. 1, Transmittal Nos. 7, 9, Order*, 10 FCC Rcd 9930 (Com. Car. Bur. 1995); *Guam Telephone Authority Petition for Declaratory Ruling, Memorandum Opinion and Order*, 9 FCC Rcd 4890 (1994); *Guam Telephone Authority Tariff F.C.C. No. 1, Transmittal Nos. 5 and 6, Order*, 9 FCC Rcd 1042 (Com. Car. Bur. 1994); *Guam Telephone Authority Tariff F.C.C. No. 1, Transmittal No. 1, Order*, 8 FCC Rcd 3640 (Com. Car. Bur. 1993).

³¹ See 47 C.F.R. § 69.601(b) (listing conditions for being deemed a NECA member). See also 47 C.F.R. §§ 69.2(y), 69.2(ii), 69.612; *Safeguards to Improve the Administration of the Interstate Access Tariff and Revenue Distribution Processes*, Report and Order and Order to Show Cause, 10 FCC Rcd 6243 (1995) (describing aspects of NECA programs relevant to conditions for NECA membership listed in 47 C.F.R. § 69.601(b)).

³² See *Guam Telephone Authority Petition for Declaratory Ruling to Participate in the National Exchange Carrier Association, Inc.*, Memorandum Opinion and Order, DA 97-1007, CCB/CPD File No. 96-29 (Com. Car. Bur. rel. May 12, 1997)(*GTA NECA Membership Order*).

exchange services pursuant to section 251(c). The Guam Commission also states that GTA responded to those requests by asserting in a letter to the Guam Commission that, under sections 3(37) and 251(f)(1) of the Act, GTA would be exempt from the requirements of section 251(c) if the Guam Commission determined, *inter alia*, that GTA is a rural telephone company.³³ The Guam Commission initiated a proceeding to resolve the issues raised by the requests and GTA's letter.³⁴ In connection with that proceeding, the Guam Commission filed the Petition described above, asking this Commission to determine whether GTA is an "incumbent local exchange carrier" under section 251(h)(1) and a "rural telephone company" under section 3(37). The Guam Commission takes no position on the merits of either of those questions.³⁵ Ten parties filed comments on the Guam Commission's Petition, and four parties replied.³⁶

11. GTA asserts that, "[u]nder a strict interpretation of section 251(h)(1) of the Act, GTA is not an incumbent local exchange carrier because it was not a member of NECA."³⁷ GTA professes no desire, however, "to avoid the obligations of" section 251(c) -- as long as the Commission rules that GTA qualifies as a "rural telephone company" under section 3(37).³⁸

12. All of the other commenters urge the Commission to minimize GTA's ability to impede competitive entry and preserve its monopoly status.³⁹ Several of those commenters

³³ Guam Commission Petition at 2-3.

³⁴ See *Applications for GTA Interconnection and Resale under the 1996 Telecommunications Act*, Guam Commission Docket No. 96-006.

³⁵ Guam Commission Petition at 3-9.

³⁶ These parties are GTA, GCT, IT&E Overseas, Inc. (IT&E), Guam Cellular Telephone Company, Inc. (Guam Cellular), MCI Telecommunications Corp. (MCI), PCI Communications, Inc. (PCI), Sprint Communications Company, L.P. (Sprint), The Employers Council, Speaker Don Parkinson of the Guam Legislature (Speaker Parkinson), Senator Thomas Ada of the Guam Legislature (Senator Ada), and Guam resident Joseph Stoll (Stoll).

³⁷ GTA Comments at 3-4.

³⁸ *Id.*

³⁹ See GCT Comments at 1-8; Guam Cellular Comments at 2-3; MCI Comments at 2-4; PCI Comments at 4-6; Sprint Comments at 1-7; Speaker Parkinson Comments at 1-2; Senator Ada Comments at 1-2; The Employers Council Comments at 1; Stoll Comments at 1-2; GCT Reply at 1-4; MCI Reply at 1-3; IT&E Reply at 4-7.

argue that GTA possesses substantial financial resources and economies of density, connectivity, and scale comparable to those possessed by LECs that are clearly incumbent LECs under section 251(h)(1). Therefore, according to these commenters, a determination that GTA is not an incumbent LEC would retard the development of competition in the local exchange and exchange access markets on Guam, in contravention of the pro-competitive purposes of the 1996 Act.⁴⁰ GCT, MCI, and PCI maintain that GTA's status as a non-member of NECA stems from GTA's failure to comply with the *Guam Jurisdictional Order* in a timely manner, conduct from which GTA allegedly should not benefit.⁴¹ GCT and MCI claim that other statutory provisions permit the Commission to impose the obligations of section 251(c) on GTA, even if GTA is not an incumbent LEC under section 251(h)(1).⁴² IT&E and GCT contend that section 251(h)(2) permits the Commission to rule that GTA must comply with those obligations.⁴³

13. With respect to whether GTA is a "rural telephone company" under section 3(37), GTA does not contend that it qualifies as a "rural telephone company" under sections 3(37)(A), (B), or (D). GTA does contend, however, that it qualifies under section 3(37)(C), because its telephone exchange service area has fewer than 100,000 access lines.⁴⁴ The other commenters identify only one potential obstacle to determining that GTA is a rural telephone company within the meaning of section 3(37)(C) -- the Commission had not formally classified GTA's service area as a "study area" prior to the close of the comment period in this proceeding.⁴⁵ Thus, the commenters discuss whether GTA needs to seek a waiver to

⁴⁰ See GCT Comments at 2-4, 7; MCI Comments at 2-4; PCI Comments at 4-6; Senator Ada Comments at 1-2; Speaker Parkinson Comments at 1-2; GCT Reply at 3-4; IT&E Reply at 4-7.

⁴¹ See PCI Comments at 4-5; GCT Reply at 3; MCI Reply at 2.

⁴² See GCT Comments at 7-8, *citing* 47 U.S.C. §§ 251(a)(1), (b)(1); MCI Reply at 1-3, *citing* 47 U.S.C. § 154(i).

⁴³ See GCT Comments at 7; IT&E Reply at 5. The Guam Commission notes that "the Commission may, by rule, provide that GTA is comparable to an incumbent LEC pursuant to Section 251(h)(2)," but "Section 251(h)(2) may not be applicable in this instance" because "GTA has not replaced an [incumbent LEC]." Petition at 9, 9 n.23.

⁴⁴ See GTA Comments at 1-2; GTA Reply at 2. In its Petition, the Guam Commission represents that it "has confirmed that GTA serves an area with fewer than 100,000 access lines. . . ." Petition at 5 n.11.

⁴⁵ See GCT Comments at 4-7; PCI Comments at 1-4; Sprint Comments at 1-7; GCT Reply at 2-3; IT&E Reply at 5-7. The Communications Act does not define "study area." The Commission has defined "study area" as a geographical segment of a carrier's telephone operations that typically corresponds to a carrier's entire service area within a state or territory. See, e.g., *Micronesian Telecommunications Corp. Request for a*

create a new study area in order to attain the status of a rural telephone company in Guam, and, if so, whether the Commission should grant such a waiver.⁴⁶

III. DECLARATORY RULING

A. GTA's Status under Section 251(h)(1)

14. Under section 251(h)(1), a LEC is an incumbent LEC with respect to a given service area if two conditions are met. The LEC must have provided telephone exchange service in that area on the date of enactment of the 1996 Act; and the LEC must have either been deemed to be a NECA member pursuant to section 69.601(b) of the Commission's rules as of that date of enactment, or become a successor or assign of a NECA member after that date.⁴⁷ GTA meets the first of these requirements. It provided local telephone exchange service in Guam on the date of enactment of the 1996 Act; indeed, it apparently was the only entity that did so. GTA, however, does not meet the second requirement. As of the date of enactment of the 1996 Act, GTA was not engaged in any of the activities that would have allowed it to be deemed a NECA member under section 69.601(b) of the Commission's rules. Moreover, since that date, GTA has not become a successor or assign of any NECA member. Consequently, we conclude that GTA is not an incumbent LEC within the meaning of section 251(h)(1).

15. As described above,⁴⁸ several commenters suggest that GTA's status as a non-member of NECA should not prevent us from classifying GTA as an incumbent LEC under section 251(h)(1). They argue that the Commission should overlook the NECA-membership

Declaratory Ruling, Report and Order, 9 FCC Rcd 2032 (Com. Car. Bur. 1994)(granting study area waiver for the Commonwealth of the Northern Mariana Islands); *Petitions for Waivers Filed by Golden Belt Telephone Association, Inc., et al.*, Memorandum Opinion and Order, 11 FCC Rcd 10165 (Accg. & Aud. Div. 1996). Thus, carriers operating in more than one state or territory usually have one study area for each state or territory, and carriers operating in a single state or territory ordinarily have a single study area. *See id.* Because the Commission froze all study area boundaries effective November 15, 1984, a local exchange carrier must apply to the Commission for a waiver of the freeze in order to create a new study area. *See* 47 C.F.R. Part 36 (Appendix-Glossary); *Request for Clarification Filed by the National Exchange Carrier Association, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 8646 (Com. Car. Bur. 1996).

⁴⁶ See GCT Comments at 4-7; PCI Comments at 1-4; Sprint Comments at 1-7; GCT Reply at 2-3; IT&E Reply at 5-7.

⁴⁷ See 47 U.S.C. § 251(h)(1).

⁴⁸ See Part II(C), *supra*.

requirement of section 251(h)(1)(B) because, in their view, GTA possesses potentially anti-competitive characteristics of incumbency that Congress designed section 251(c) specifically to redress. These characteristics allegedly include dominance in the local exchange and exchange access markets, formidable financial resources, and economies of density, connectivity, and scale. Congress, however, defined incumbent LEC in section 251(h)(1), and the Congressional definition requires NECA membership. Accordingly, we reject the suggestions of those commenters that urge us to overlook the NECA membership requirement.

16. GCT, MCI, and PCI assert that GTA's refusal to comply promptly with the *Guam Jurisdictional Order* has enabled it to avoid meeting the requirements of section 251(h)(1) and, as a consequence, the obligations imposed on incumbent LECs by the Act. These parties contend that GTA should not be allowed to benefit from its improper conduct.⁴⁹ PCI claims, for example, that:

the fact that [GTA] has never been "deemed" to be a NECA member under section 69.601(b) . . . is solely a result of its historic and continued policy of excluding itself from compliance with the Commission's Part 69 and other related rules in general. Over four years ago, the Commission directed GTA [in the *Guam Jurisdictional Order*] to show cause why it should not be required to file lawful interstate and foreign access tariffs in compliance with applicable requirements. . . . To date, GTA has still not submitted to the Commission an access tariff which complies with the Commission's Part 69 rules, despite continued assurances that it will ultimately do so. For the Commission to reward such non-compliance by declining to classify GTA as an "incumbent local exchange carrier" would stand logic on its head, place form over substance, and contradict the plain goals which the Telecommunications Act of 1996 . . . advances.⁵⁰

17. Given that these parties have not fully explained how GTA would have been "deemed" to be a NECA member under section 69.601(b) of the Commission's rules had GTA complied with Part 69 of those rules, we see no basis for resorting to an analysis akin to the equitable doctrine of "unclean hands." Instead, we conclude, as set forth in Part IV, *infra*, that the best approach is to undertake a rulemaking pursuant to section 251(h)(2) to determine whether GTA should be treated as an incumbent LEC for purposes of section 251. Therefore,

⁴⁹ See PCI Comments at 4-5; GCT Reply at 3; MCI Reply at 2.

⁵⁰ PCI Comments at 4-5 (citation omitted).

we reject the argument that GTA's actions in response to the *Guam Jurisdictional Order* require us to classify GTA as an incumbent LEC under section 251(h)(1).⁵¹

18. MCI suggests that the Commission rely on section 4(i) of the Act⁵² to classify GTA as an incumbent LEC.⁵³ Section 4(i) gives the Commission broad authority to "perform any and all acts . . . and issue such orders . . . as may be necessary in the execution of its functions," but only where doing so is "not inconsistent with this Act."⁵⁴ Consequently, section 4(i) arguably does not permit us to circumvent the NECA- membership requirement of section 251(h)(1). We need not resolve the extent of our authority under section 4(i), however, because we tentatively conclude below that GTA may be classified as an incumbent LEC pursuant to the authority of section 251(h)(2).

19. GCT urges the Commission to rule that, given the unique circumstances here, GTA's general duties of interconnection under section 251(a)(1)⁵⁵ and of resale under section 251(b)(1)⁵⁶ are equivalent to the specific duties of interconnection and resale delineated in section 251(c).⁵⁷ The express language and structure of section 251 compel rejection of that approach. Sections 251(a) through 251(c) create a three-tiered hierarchy of escalating obligations based on the type of carrier involved. Section 251(a) imposes relatively limited duties on all telecommunications carriers; section 251(b) imposes more extensive duties on telecommunications carriers that are LECs; and section 251(c) imposes the most extensive duties on LECs that are incumbent LECs. Imposing the section 251(c) obligations on a

⁵¹ We express no opinion herein whether GTA's response to the *Guam Jurisdictional Order* has been appropriate.

⁵² 47 U.S.C. § 154(i). Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." *Id.*

⁵³ See MCI Reply at 2.

⁵⁴ 47 U.S.C. § 154(i).

⁵⁵ 47 U.S.C. § 251(a)(1). Section 251(a)(1) provides, in pertinent part, that "[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. . . ." *Id.*

⁵⁶ 47 U.S.C. § 251(b)(1). Section 251(b)(1) provides, in pertinent part, that "[e]ach local exchange carrier has . . . [t]he duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services. . . ." *Id.*

⁵⁷ See GCT Comments at 7-8.

carrier that is not an incumbent LEC would contravene the carefully-calibrated regulatory regime crafted by Congress.⁵⁸

20. In sum, because GTA was not deemed to be a member of NECA as of the date of enactment of the 1996 Act and subsequently has not become a successor or assign of a NECA member, we conclude that GTA is not an "incumbent local exchange carrier" within the meaning of section 251(h)(1). As discussed below, however, we propose to treat GTA as an incumbent LEC under section 251(h)(2). Consistent with the authorization in section 251(h)(2) that we may provide for such treatment "by rule,"⁵⁹ and consistent with several parties' suggestions,⁶⁰ we initiate a Notice of Proposed Rulemaking regarding whether such treatment would be consistent with the language and purposes of section 251(h)(2).⁶¹

B. GTA's Status under Section 3(37)

21. Under section 3(37)(C), a local exchange carrier that "provides telephone exchange service to any local exchange study area with fewer than 100,000 access lines" is a "rural telephone company."⁶² GTA serves fewer than 100,000 access lines in its operating territory.⁶³ Nevertheless, GCT and Sprint argue that GTA does not qualify as a rural telephone company under section 3(37)(C) because the Commission has never designated that

⁵⁸ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16110, ¶ 1248 (1996) (*Local Competition Order*) (holding that Commission cannot impose on non-incumbent LECs the obligations of section 251(c) unless the criteria set forth in section 251(h)(2) are met), *recon.*, 11 FCC Rcd 13042 (1996), *further recon.*, FCC 96-476 (rel. Dec. 13, 1996), *additional petitions for recon. pending, petitions for review pending sub nom., Iowa Utilities Board, et al. v. FCC*, No. 96-3321 and consolidated cases (8th Cir. argued Jan. 17, 1997). See also *Local Competition Order*, 11 FCC Rcd at 15518, 15991, 15996, 16107-10, ¶¶ 37, 997, 1006, 1241-48 (holding that states may not impose on non-incumbent LECs the obligations of section 251(c)). On October 15, 1996, the United States Court of Appeals for the Eighth Circuit issued an order staying certain provisions of the *Local Competition Order* not relevant here. *Iowa Utilities Board v. FCC*, 1996 WL 589204 (8th Cir.), *application to vacate stay denied*, 117 S.Ct. 379 (Thomas, J.), *further applications to vacate stay denied*, 117 S.Ct. 429 (1996) (full Court).

⁵⁹ 47 U.S.C. § 251(h)(2).

⁶⁰ See Guam Commission Petition at 9; GCT Comments at 7; IT&E Reply at 5.

⁶¹ See Part IV, *infra*.

⁶² 47 U.S.C. § 153(37)(C). GTA does not contend that it meets the criteria for rural telephone company status in sections 3(37)(A), (B), or (D).

⁶³ See Petition at 5 n.11; *Phone Facts* at 9.

operating territory as a study area.⁶⁴ Subsequent to the close of the comment period in this proceeding, however, the Common Carrier Bureau granted GTA's request for a waiver to create a new study area encompassing Guam.⁶⁵ We determine, therefore, that GTA falls within the definition of "rural telephone company" set forth in section 3(37)(C).

IV. NOTICE OF PROPOSED RULEMAKING

A. Overview

22. In Part III, *supra*, we determine that GTA is *not* an "incumbent local exchange carrier" within the meaning of section 251(h)(1). This determination means that, absent a Commission decision to provide for the treatment of GTA as an incumbent LEC for purposes of section 251, GTA will presently be under no legal mandate to comply with the obligations of section 251(c).⁶⁶

23. IT&E and GCT suggest section 251(h)(2) as an alternative for applying the obligations of section 251(c) to GTA. IT&E asserts that section 251(h)(2) permits the application of the obligations of section 251(c) to GTA because "GTA meets the spirit, if not the letter, of the statutory definition of an incumbent LEC."⁶⁷ GCT maintains that section 251(h)(2) permits the application of the obligations of section 251(c) to GTA because GTA "occupies a position 'comparable' to the position occupied by an incumbent LEC (*i.e.*, a quasi-monopoly position)."⁶⁸ The Guam Commission notes that "the Commission may, by rule, provide that GTA is comparable to an incumbent LEC pursuant to Section 251(h)(2)." but "Section 251(h)(2) may not be applicable in this instance" because "GTA has not replaced an ILEC."⁶⁹

⁶⁴ See GCT Comments at 4-7; Sprint Comments at 1-7; GCT Reply at 2-3.

⁶⁵ *Guam Telephone Authority Petition for Declaratory Ruling*, Report and Order, DA 97-595 (Accg. & Aud. Div. rel. March 21, 1997)(granting GTA's request for designation of Guam as a study area).

⁶⁶ See *Local Competition Order*, 11 FCC Rcd at 16107-10, ¶¶ 1241-48.

⁶⁷ IT&E Reply at 5.

⁶⁸ GCT Comments at 7.

⁶⁹ Petition at 9, 9 n.23.

24. Section 251(h)(2) allows the Commission to treat a LEC (or class or category of LECs) as an incumbent LEC, for purposes of section 251, when the LEC "occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in [section 251(h)(1)]":⁷⁰ the LEC has "substantially replaced an incumbent local exchange carrier described in [section 251(h)(1)]";⁷¹ and "such treatment is consistent with the public interest, convenience, and necessity and the purposes of [section 251]."⁷² In this Notice, we tentatively conclude that each of these requirements is met with respect to GTA.

25. Regarding the first requirement, we tentatively conclude that GTA occupies a position in the market for telephone exchange service in its service area that is comparable to an incumbent LEC's, because GTA appears to occupy a dominant position in that market. Regarding the second requirement, we tentatively reject an overly literal reading of the statutory language that would produce absurd results at odds with manifest Congressional intent. Instead, we tentatively conclude that the second requirement is satisfied where the LEC at issue provides local exchange service to all or virtually all of the subscribers in an area that did not receive telephone exchange service from a NECA member as of the date of enactment of the 1996 Act. Accordingly, we also tentatively conclude that GTA satisfies the second requirement, because GTA apparently provides all or virtually all of the telephone exchange service in Guam, and no NECA member provided telephone exchange service in Guam as of February 8, 1996. Regarding the third requirement, we tentatively conclude that treatment of GTA as an incumbent LEC would serve the public interest, convenience, and necessity and the purposes of section 251, because such treatment would foster the development of competitive telecommunications markets in Guam. In light of the foregoing tentative conclusions, we propose, pursuant to section 251(h)(2), to adopt a rule providing for the treatment of GTA as an incumbent LEC for purposes of section 251. We also seek comment whether LECs situated similarly to GTA exist and, if so, whether we should adopt the same rule with respect to such class or category of LECs.

⁷⁰ 47 U.S.C. § 251(h)(2)(A).

⁷¹ 47 U.S.C. § 251(h)(2)(B).

⁷² 47 U.S.C. § 251(h)(2)(C).

B. Discussion

1. Section 251(h)(2)(A)

26. Under section 251(h)(2)(A), in order for the Commission to treat GTA as an incumbent LEC, GTA must "occup[y] a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in [section 251(h)(1)]."⁷³ Incumbent LECs typically occupy a dominant position in the market for telephone exchange service in their respective operating areas, and possess economies of density, connectivity, and scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of section 251(c).⁷⁴

27. GTA seems to exercise such dominance in Guam. It apparently is the sole provider of local exchange and exchange access services on Guam. It therefore appears to control the bottleneck local exchange network on Guam and possess substantial economies of density, connectivity, and scale that, absent compliance with the obligations of section 251(c), can impede the development of telephone exchange service competition in Guam.⁷⁵ Consequently, we tentatively conclude that GTA occupies a position in the market for telephone exchange service in Guam that is comparable to the position typically occupied by statutorily-defined incumbent LECs. Accordingly, we also tentatively conclude that GTA satisfies the requirement of section 251(h)(2)(A). We invite comment on these tentative conclusions.

⁷³ 47 U.S.C. § 251(h)(2)(A).

⁷⁴ See *Local Competition Order*, 11 FCC Rcd at 15505-12, ¶¶ 1-20.

⁷⁵ See GCT Comments at 1-8; Guam Cellular Comments at 2-3; MCI Comments at 2-4; FCI Comments at 4-6; Sprint Comments at 1-7; Speaker Parkinson Comments at 1-2; Senator Ada Comments at 1-2; The Employers Council Comments at 1; Stoll Comments at 1-2; GCT Reply at 1-4; MCI Reply at 1-3; IT&E Reply at 4-7. See also Letter dated February 5, 1997 from Veronica M. Ahern, GTA's outside counsel, to Alex Starr, FCC's Common Carrier Bureau, CCB Pol. 96-18; Comments of the Guam Telephone Authority in *Applications for GTA Interconnection and Resale Under the 1996 Telecommunications Act*, Guam Commission Docket No. 96-006, at 3 n.4 (attached to the Guam Commission's Petition); *Phone Facts* at 9; Comments of Guam Cable Telecommunications, Inc. in *Applications for GTA Interconnection and Resale Under the 1996 Telecommunications Act*, Guam Commission Docket No. 96-006, at 2 (attached to the Guam Commission's Petition); Comments of TelePacific Network, Inc. in *Applications for GTA Interconnection and Resale Under the 1996 Telecommunications Act*, Guam Commission Docket No. 96-006, at Exhibit C (attached to the Guam Commission's Petition).

2. Section 251(h)(2)(B)

28. Under Section 251(h)(2)(B), in order for the Commission to treat GTA as an incumbent LEC, GTA must have "substantially replaced an incumbent local exchange carrier described in [section 251(h)(1)]."⁷⁶ The word "replace" can mean "to take the place of: serve as a substitute for or successor of: SUCCEED, SUPPLANT. . . ."⁷⁷ Consequently, if construed literally, section 251(h)(2)(B) would mean that GTA must have supplanted an incumbent LEC (as defined in section 251(h)(1)) in its service area in order to be treated as an incumbent LEC for purposes of section 251. GTA did not supplant such an incumbent LEC, because none existed as of the date of enactment of the 1996 Act.⁷⁸

29. We invite comment on whether we should construe section 251(h)(2)(B) so literally. The Supreme Court has long and consistently recognized that the "plain meaning" rule of statutory construction must give way when its application would result in an absurd outcome contrary to the clear intent of Congress:

It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. . . . If a literal construction of the words be absurd, the Act must be construed to avoid the absurdity.⁷⁹

Indeed, the Supreme Court has further instructed that "even when the plain meaning [of statutory language] d[oes] not produce absurd results but merely an unreasonable one plainly

⁷⁶ 47 U.S.C. § 251(h)(2)(B).

⁷⁷ *Webster's Third New International Dictionary of the English Language Unabridged* (1993) at 1925.

⁷⁸ Indeed, since its inception in 1973, GTA apparently has been the sole provider of local telephone exchange service in Guam. See Part II(B), *supra*.

⁷⁹ *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1898). See, e.g., *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454-455 (1989) ("Where the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope. The circumstances of the enactment of a particular legislation, for example, may persuade a court that Congress did not intend words of common meaning to have their literal effect"); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (where "the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters[,] . . . the intention of the drafters, rather than the strict language, controls"); *United Steelworkers of America v. Weber*, 443 U.S. 193, 201-04 (1979).

at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words."⁸⁰

30. The United States Courts of Appeals have followed these precedents when necessary to avoid results that are clearly inconsistent with Congressional intent.⁸¹ So, too, has the Commission.⁸²

31. In keeping with this consistent precedent, we tentatively conclude that we should find section 251(h)(2)(B) satisfied where, as here, the LEC at issue provides local exchange service to all or virtually all of the subscribers in an area that did not receive telephone exchange service from a NECA member as of the date of enactment of the 1996 Act. In our tentative view, we must so construe section 251(h)(2)(B) in order to avoid absurd and unreasonable results clearly contradictory of Congressional intent. We seek comment on these tentative conclusions.

32. These tentative conclusions are premised on Congress' clearly expressed purpose in the 1996 Act "to provide for a pro-competitive, de-regulatory *national* policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to *all* Americans by opening

⁸⁰ *United States v. American Trucking Associations*, 310 U.S. 534, 543 (1967)(citations, footnote, and quotation marks omitted). Compare *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218 (1994)(adhering to literal meaning of tariff provision of Communications Act partly because doing otherwise would frustrate purposes of complaint provisions of that Act).

⁸¹ See, e.g., *Environmental Defense Fund v. Environmental Protection Agency*, 82 F.3d 451, 468-469 (D.C. Cir.), *amended on other grounds*, 92 F.3d 1209 (D.C. Cir. 1996)("Because this literal reading of the statute would actually frustrate the congressional intent supporting it, we look to the EPA for an interpretation of the statute more true to Congress's purpose"); *In re Nofziger*, 925 F.2d 428, 434-435 (D.C. Cir. 1991)("In statutory interpretation it is a given that statutes must be construed reasonably so as to avoid absurdities -- manifest intent prevails over the letter"); *Quinn v. Butz*, 510 F.2d 743, 753-54 (D.C. Cir. 1975)("The Secretary's interpretation obviously rests upon a literal reading of the language, a technique which may well stifle true legislative intent"); *Red River Broadcasting Co. v. Federal Communications Commission*, 98 F.2d 282, 287 (D.C. Cir.), *cert. denied*, 305 U.S. 625 (1938)("A well-settled rule of statutory construction enjoins courts not to attribute to the Legislature a construction which leads to absurd results").

⁸² See *Application of Fox Television Stations, Inc.*, Third Memorandum Opinion and Order, 10 FCC Rcd 8452, 8471 (1995), *recon. denied*, 11 FCC Rcd 7773 (1996)(rejecting literal "count-the-shares" methodology for determining whether foreign ownership ceiling in 47 U.S.C. § 310(b)(4) is reached), *petitions for review pending sub nom., Metropolitan Council of NAACP Branches, et al. v. FCC*, No. 95-1424 and consolidated case (D.C. Cir. filed Aug. 21, 1995).

all telecommunications markets to competition. . . .⁸³ To accomplish this purpose, Congress chose, *inter alia*, to impose on entities that are classified as incumbent LECs the duties of interconnection, access to unbundled network elements, resale of retail services, collocation, public notification of interoperability changes, and good faith negotiation specified in section 251(c).⁸⁴ These duties require incumbent LECs to share with competitors some of their inherent economic advantages -- advantages that would otherwise render competitive entry very difficult, if not impossible. For example, the existing infrastructure of the incumbent LEC in an area enables the incumbent LEC to serve new customers therein at a much lower incremental cost than a facilities-based entrant that must install its own switches, trunking, and loops to serve its customers. Because the incumbent LEC is typically dominant in its service area, it has little economic incentive to assist new entrants. Prior to the enactment of section 251(c), an incumbent LEC also had the ability to discourage entry and robust competition by refusing to interconnect its network with the new entrant's network or by insisting on supracompetitive prices or other unreasonable conditions for terminating calls from the entrant's customers to its customers.⁸⁵

33. An unduly literal construction of section 251(h)(2)(B) would mean that these statutory objectives would be thwarted in Guam unless GTA were to comply voluntarily with each of the obligations of section 251(c). Indeed, GTA appears to possess all of the advantages of incumbency characteristic of the incumbent LECs described in section 251(h)(1), advantages that can impede the development of competitive markets. For example, GTA apparently has substantial financial resources, significant economies of density, connectivity, and scale, and, most importantly, control of the bottleneck local exchange network in Guam.⁸⁶ Thus, the seemingly dominant market presence of GTA in Guam appears

⁸³ Joint Explanatory Statement at 1 (emphasis added). *See generally* 47 U.S.C. § 160(b)(providing in the 1996 Act that "forbearance is in the public interest" if it "will promote competitive market conditions" and "enhance competition among providers of telecommunications services"); 47 U.S.C. § 253(authorizing Commission to preempt state or local laws that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"); 47 U.S.C. § 257(b)(describing the "policies and purposes of this [1996] Act" as "favoring . . . vigorous economic competition").

⁸⁴ *See* 47 U.S.C. § 251(c).

⁸⁵ *See Local Competition Order*, FCC Rcd at 15505-12, ¶¶ 1-20.

⁸⁶ *See* GCT Comments at 1-8; Guam Cellular Comments at 2-3; MCI Comments at 2-4; PCI Comments at 4-6; Sprint Comments at 1-7; Speaker Parkinson Comments at 1-2; Senator Ada Comments at 1-2; The Employers Council Comments at 1; Stoll Comments at 1-2; GCT Reply at 1-4; MCI Reply at 1-3; IT&E Reply at 4-7. *See also* Letter dated February 5, 1997 from Veronica M. Ahern, GTA's Outside Counsel, to Alex Starr, FCC's Common Carrier Bureau, CCB Pol. 96-18; Comments of the Guam Telephone Authority in *Applications for GTA Interconnection and Resale Under the 1996 Telecommunications Act*, Guam Commission Docket No.

to be precisely the type of non-competitive situation that Congress intended section 251(c) to redress.

34. Moreover, we note that Congress left intact several provisions of the Communications Act that led the Commission in 1992 to conclude that "the Communications Act was intended by Congress to apply, . . . in every respect, to all radio and wire communications originating or terminating on the Territory of Guam."⁸⁷ First, in the 1996 Act, Congress incorporated by reference the definitions in the 1934 Act.⁸⁸ Those definitions define the "United States" as including "the several States and Territories . . . and the possessions of the United States . . .";⁸⁹ define "State" as including "the Territories";⁹⁰ and define "interstate communication" as including "communication or transmission . . . from any State, Territory, or possession of the United States . . . to any other State, Territory, or possession of the United States . . .".⁹¹ Furthermore, despite amending section 1 of the 1934 Act in other respects, Congress left unchanged that section's command to the Commission "to make available, so far as possible, to *all the people of the United States* . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . .".⁹² These provisions appear to make clear that Congress believed that "the residents of Guam are just as entitled to the benefits of competition in

96-006, at 3 n.4 (attached to the Guam Commission's Petition); Comments of Guam Cable Telecommunications, Inc. in *Applications for GTA Interconnection and Resale Under the 1996 Telecommunications Act*, Guam Commission Docket No. 96-006, at 2 (attached to the Guam Commission's Petition); Comments of TelePacific Network, Inc. in *Applications for GTA Interconnection and Resale Under the 1996 Telecommunications Act*, Guam Commission Docket No. 96-006, at Exhibit C (attached to the Guam Commission's Petition).

⁸⁷ *Guam Jurisdictional Order*, 7 FCC Rcd at 4024.

⁸⁸ 47 U.S.C. § 153(b).

⁸⁹ 47 U.S.C. § 153(50)(emphasis added).

⁹⁰ 47 U.S.C. § 153(40).

⁹¹ 47 U.S.C. § 153(22)(emphasis added).

⁹² 47 U.S.C. § 151(emphasis added). See Joint Explanatory Statement at 32.

telecommunications as any other Americans,"⁹³ and suggest that Congress did not intend to exclude GTA from treatment as an incumbent LEC for purposes of section 251(c).⁹⁴

35. Of course, under section 251(f), our holding that GTA is a "rural telephone company" within the meaning of section 3(37) would entitle GTA to an exemption, at least initially, from the obligations of section 251(c), should GTA be treated as an incumbent LEC in the future.⁹⁵ Congress included within section 251(f), however, a procedure for terminating such an exemption under appropriate circumstances. Construing section 251(h)(2)(B) to foreclose the possibility of classifying GTA as an incumbent LEC would thwart that procedure, substituting a permanent exemption for the potentially temporary exemption expressly set forth in section 251(f).

36. An overly literal interpretation of section 251(h)(2)(B) would also exalt form over substance. As indicated previously, on May 12, 1997, the Commission granted NECA's petition to become a member of NECA.⁹⁶ GTA apparently could have filed that petition at any time after the release of the *Guam Jurisdictional Order* on June 2, 1992. Thus, it appears that only the date of initial NECA membership will distinguish GTA from LECs that are incumbent LECs under section 251(h)(1).

37. In sum, the circumstances with respect to GTA and Guam appear to counsel against an overly literal construction of statutory language.⁹⁷ Construed so literally, the language of section 251(h)(2)(B) would produce absurd results "demonstrably at odds with the

⁹³ *Guam Jurisdictional Order*, 7 FCC Rcd at 4024, 4026. See *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Report and Order, 11 FCC Rcd 9564, 9589-99 (1996)(applying rate integration requirements of section 254(g) to Guam because section 153(40) defines "State" to include "the Territories").

⁹⁴ See generally 142 *Cong. Rec.* H1145, 1175 (Feb. 1, 1996)(statement of Representative Underwood)("My focus on this telecommunications legislation has been on ensuring that Guam has the same access to telecommunications technology and advances in the information superhighway as other U.S. citizens"); cf. *Guam Telephone Authority Petition for Declaratory Ruling*, Memorandum Opinion and Order, 9 FCC Rcd 4890 (1994)(ordering GTA to implement Feature Group D Equal Access, because doing so would promote interexchange competition and technological development of new telecommunications services in Guam and thereby prevent Guam from becoming a "technological backwater with inferior communications services").

⁹⁵ See Parts II(A), III(B), *supra*.

⁹⁶ See ¶ 9, *supra*.

⁹⁷ See, e.g., *EDF v. EPA*, 82 F.3d at 468-69.

intention of its drafters."⁹⁸ The most immediate absurdity would be a permanent exemption of a seemingly dominant provider of local exchange and exchange access services -- GTA -- from the very requirements that Congress designed specifically to end such dominance and foster competition in local exchange and exchange access markets. Furthermore, this result would not be benign; rather, it apparently would conflict with Congress' pro-competitive objectives with respect to the twenty-ninth largest local telephone network in the United States. We seek comment, therefore, on whether the outcome suggested by an unduly literal reading of the statute's language would be an "unreasonable one plainly at variance with the policy of the legislation as a whole."⁹⁹

38. To avoid these absurd results and to construe the statute consistently with Congress' obvious pro-competitive purpose, we propose to interpret section 251(h)(2)(B) to include any LEC that provides telephone exchange service to all or virtually all of the subscribers in its service area, where, as here, no NECA member served the area at issue as of the date of enactment of the 1996 Act. Accordingly, we also propose to find that GTA satisfies section 251(h)(2)(B) as construed in this manner. We invite comment on these proposals.

39. We also seek comment whether reading section 251(h)(2) in conjunction with other provisions of the Communications Act creates ambiguity in section 251(h)(2)'s meaning and intended application such that we may reasonably exercise our discretion to construe the statute to permit treating GTA as an incumbent LEC. Applying section 251(h)(2) so as to exempt GTA permanently from the statutory responsibilities of an incumbent LEC would, as described above, arguably conflict with sections 251(c) and 251(f), among other Communications Act provisions.¹⁰⁰

3. Section 251(h)(2)(C)

40. Under section 251(h)(2)(C), in order for the Commission to treat GTA as an incumbent LEC for purposes of section 251, "such treatment [must be] consistent with the public interest, convenience, and necessity and the purposes of [section 251]."¹⁰¹ As described

⁹⁸ *U.S. v. Ron Pair*, 489 U.S. at 242.

⁹⁹ *Quinn v. Butz*, 510 F.2d at 753 (quoting *U.S. v. A.T.A.*, 310 U.S. at 543).

¹⁰⁰ *Cf. Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1067-68 (6th Cir. 1997)(holding that two statutory provisions were in direct conflict, creating "a rare but difficult form of ambiguity").

¹⁰¹ 47 U.S.C. § 251(h)(2)(C).

above.¹⁰² Congress has declared unequivocally that promoting competition in local exchange and exchange access markets serves the public interest, convenience, and necessity. Treating GTA as an incumbent LEC would promote competition in the local exchange and exchange access markets in Guam, because such treatment would require GTA to comply with the pro-competitive obligations of section 251(c), absent an exemption, suspension, or modification under section 251(f). Moreover, because GTA appears to be the sole provider of local exchange and exchange access services in Guam, we tentatively conclude that GTA has market power, economies of density, connectivity, and scale, and control of the local network comparable to that possessed by entities that are incumbent LECs under section 251(h)(1). Consequently, treating GTA as an incumbent LEC may well be a prerequisite for the development of competition in the local exchange and exchange access markets in Guam. Thus, we tentatively conclude that treating GTA as an incumbent LEC for purposes of section 251 would be consistent with the public interest, convenience, and necessity.

41. For similar reasons, we also tentatively conclude that treating GTA as an incumbent LEC would be consistent with the purposes of section 251. Section 251's primary purpose is to foster competition that otherwise would not likely develop in local exchange and exchange access markets. It is possible that failing to treat GTA as an incumbent LEC would stifle competition in Guam.

42. Having tentatively concluded that GTA has market power, economies of density, connectivity, and scale, and control of the local network, and that treating GTA as an incumbent LEC would be consistent with the public interest, convenience, and necessity and the purposes of section 251, we further conclude tentatively that the circumstances here satisfy the requirements of section 251(h)(2)(C). We invite comment regarding these tentative conclusions.

4. Proposal to Treat GTA -- and Possibly Others -- as an Incumbent LEC

43. For all of the reasons explained above, we tentatively conclude that the relevant facts and circumstances meet the requirements of section 251(h)(2) for treating GTA as an incumbent LEC for purposes of section 251. Accordingly, we propose to provide for the treatment of GTA as an incumbent LEC for purposes of section 251. We seek comment regarding this tentative conclusion and proposal. We also seek comment whether LECs situated similarly to GTA exist and, if so, whether we should adopt the same rule with respect to such class or category of LECs.

¹⁰² See Part IV(B)(2), *supra*.

C. Procedural Matters

1. *Ex Parte* Presentations

44. With respect to the rulemaking proposal in Part IV, *supra*, to treat GTA as an incumbent local exchange carrier pursuant to section 251(h)(2), this is a non-restricted notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as required by the Commission's rules.¹⁰³

2. Initial Regulatory Flexibility Analysis

45. Section 603 of the Regulatory Flexibility Act, as amended,¹⁰⁴ requires an initial regulatory flexibility analysis in notice and comment rulemaking proceedings, unless we certify that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."¹⁰⁵ Our proposal in Part IV, *supra*, to treat GTA as an incumbent local exchange carrier pursuant to section 251(h)(2) will affect only GTA and the limited number of entities that seek to interconnect with GTA's network or resell GTA's services. Even if all of these entities can be classified as small entities, we do not believe that they constitute a "significant number of small entities" for purposes of the Regulatory Flexibility Act. Therefore, we certify that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including this certification and statement, to the Chief Counsel for Advocacy of the Small Business Administration.¹⁰⁶ A copy of this certification also will be published in the Federal Register notice.

3. Comment Filing Procedures

46. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,¹⁰⁷ interested parties may file comments on or before July 7, 1997 and reply comments on or before July 28, 1997. To file formally in this proceeding, you must

¹⁰³ See generally 47 C.F.R. §§ 1.1201, 1.1203, and 1.1206.

¹⁰⁴ 5 U.S.C. § 603.

¹⁰⁵ 5 U.S.C. § 605(b).

¹⁰⁶ See 5 U.S.C. § 605(b).

¹⁰⁷ 47 C.F.R. §§ 1.415, 1.419.